

**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

BRYAN WILKINSON, et al.,	:	
Plaintiffs	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 09-507
HUFFY CORPORATION, et al.,	:	
Defendants	:	

August 11, 2009

**Anita B. Brody, J.**

**MEMORANDUM**

In January 2007, seven-year-old Brooke Wilkinson (“Brooke”) injured herself by falling on a baby gate. Her parents Bryan and Kathleen Wilkinson (“Wilkinsons”) brought this action in the Court of Common Pleas of Montgomery County, Pennsylvania, on her behalf against Huffey Corporation (“Huffey”), Gerry Baby Products (“Gerry Baby”), Gerry Wood Products (“Gerry Wood”), and Evenflo Company (“Evenflo”). The defendants removed the case to federal court on February 20, 2009.<sup>1</sup> Before me are two motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), one filed by Evenflo and the other filed by Huffey (Docs. #5 and #11).

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<sup>1</sup> Jurisdiction exists pursuant to 28 U.S.C. § 1332(a) because the amount in controversy exceeds \$75,000 and complete diversity of citizenship exists between the Wilkinsons (Pennsylvania) and Evenflo (Delaware and Ohio), Huffey (Ohio), and Gerry Baby (Wisconsin and Delaware), and Gerry Wood (Wisconsin and Delaware).

## I. BACKGROUND<sup>2</sup>

Gerry Baby and Gerry Wood designed, manufactured, and constructed the Gerry Baby Gate in 1995. The Wilkinsons received this gate as a gift in 1996. Brooke fell on the gate in January 2007, striking her face on an exposed metal clip that protruded from it. She suffered severe injuries as a result. (Compl. ¶¶ 10-12.)

Prior to March 7, 1997, Huffly owned Gerry Baby and Gerry Wood. On March 7, 1997, Evenflo purchased Gerry Baby and Gerry Wood from Huffly pursuant to an Asset Purchase Agreement (“Agreement”).<sup>3</sup> (Compl. ¶¶ 7-8.) With regard to third parties, the Agreement states as follows: “Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it and their respective successors and assigns.” (Compl. Ex. A § 13.4.) With regard to indemnification, the Agreement also states as follows:

Huffly and Sellers shall, jointly and severally, indemnify and hold Purchaser and its Affiliates, and their successors and assigns, harmless from and against, and in respect of . . . all obligations and liabilities of Sellers or any of its Affiliates, whether accrued, absolute, fixed, contingent or otherwise, not assumed by Purchaser pursuant to the Assumption Agreement or under any other agreement executed and delivered by the parties in furtherance of the transactions described herein.

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<sup>2</sup> In deciding a 12(b)(6) motion, a court must “accept all factual allegations as true [and] construe the complaint in the light most favorable to the plaintiff.” Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002). Thus, here the facts are stated in the light most favorable to the Wilkinsons.

<sup>3</sup> A court deciding a 12(b)(6) motion generally may not consider materials extraneous to the complaint, but a “document integral to or explicitly relied upon in the complaint” may be considered. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). Because the Wilkinsons’ complaint explicitly relies upon and incorporates the Agreement, I will consider the Agreement here.

(Compl. Ex. A § 10.2.)

## **II. STANDARD**

When deciding a 12(b)(6) motion a court must “construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (internal quotations omitted). “A complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (U.S. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged . . . but it has not ‘show[n] . . . that the pleader is entitled to relief.’” Iqbal, 129 S. Ct. at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

## **III. DISCUSSION**

In their complaint, the Wilkinsons assert claims of strict liability (Count I), negligence (Count II), breach of express warranty (Count III), breach of implied warranty (Count IV), and failure to warn (Count V) against Gerry Baby, Gerry Wood, and Evenflo. The Wilkinsons also assert a claim for breach of contract (Count VI) against all four defendants, including Huffy. The parties both submitted briefs indicating that Pennsylvania law governs this matter.

The Wilkinsons have conceded that their claims against Gerry Baby and Gerry Wood may be dismissed because the companies no longer exist. They also concede that Counts II to VI (negligence, breach of express warranty, breach of implied warranty, failure to warn, and breach of contract) against Evenflo may be dismissed. However, the Wilkinsons stand by Count I (strict liability) against Evenflo and Count VI (breach of contract) against Huffy. These claims are discussed below.

#### **A. Count I (Strict Liability) Against Evenflo**

Section 402A of the Second Restatement of Torts has been adopted in Pennsylvania law. Webb v. Zern, 220 A.2d 853, 854 (Pa. 1966). Accordingly, three types of defects may give rise to strict products liability in Pennsylvania: design, manufacturing, and failure to warn. Phillips v. A-Best Prods. Co., 665 A.2d 1167, 1170 (Pa. 1995). Although the Wilkinsons do not specify which theory of liability they advance, it seems clear from their pleadings that they allege a design defect. To establish strict liability, “a plaintiff has the burden of showing that the product was defective, that the defect was the proximate cause of his or her injuries and that the defect existed at the time the product left the manufacturer.” Dansak v. Cameron Coca-Cola Bottling Co., Inc., 703 A.2d 489, 495 (Pa. Super. Ct. 1997) (internal quotations omitted). With regard to the first element, a plaintiff alleging a defective design must prove that the design made the product unreasonably dangerous. Schindler v. Sofamor, 2001 PA Super 118.

The Wilkinsons allege that the Gerry Baby Gate’s design lacked safeguards necessary for the gate’s intended use. They specify that the gate had “an exposed, protruding and unnecessarily sharp metal clip.” (Compl. ¶ 12.) The Wilkinsons also allege that this defect existed when the

gate left the manufacturer and proximately caused Brooke's injuries. Therefore, I find that they have alleged a strict liability claim against the manufacturer, Gerry Baby and Gerry Wood.

However, the Wilkinsons are suing Evenflo, the manufacturer's successor. When a corporation acquires another corporation, the successor corporation (the purchaser) does not acquire the liabilities of the predecessor corporation (the seller) merely because it acquires the predecessor's assets. Kradel v. Fox River Tractor Co., 308 F.3d 328, 331 (3d Cir. 2002). At the same time, Pennsylvania courts recognize the "product line exception" to the rule of successor liability. This exception allows successor liability when the successor corporation maintains the predecessor's product and continues to manufacture, market, and sell the product. Id. The Third Circuit has explained:

[W]here one corporation acquires all or substantially all the manufacturing assets of another corporation, even if exclusively for cash, and undertakes essentially the same manufacturing operation as the selling corporation, the purchasing corporation is strictly liable for injuries caused by defects in units of the same product line, even if previously manufactured and distributed by the selling corporation or its predecessor.

Id. (citing Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 107 (Pa. Super. Ct. 1981)). For this exception, Pennsylvania courts also require that the plaintiff has no remedy against the original manufacturer. Kradel, 308 F.3d at 332 (applying Pennsylvania law). Therefore, the product line exception requires not only, (1) the successor's acquisition of the manufacturing assets and continuation of the seller's manufacturing operation but also (2) "the virtual destruction of plaintiff's remedies against the original manufacturer." Id. at 331 (internal quotations omitted).

The Wilkinsons argue that the product-line exception applies here because Evenflo purchased Gerry Baby and Gerry Wood. Evenflo responds that the exception does not apply

because Gerry Baby and Gerry Wood remain viable defendants. Regarding the first element of the exception, the Wilkinsons allege that Evenflo purchased virtually all of the assets of Gerry Baby and Gerry Wood. The Wilkinsons also allege that Evenflo continues to manufacture, market, and sell Gerry Baby and Gerry Wood products as well as to use the Gerry Baby and Gerry Wood trade names and goods. (Compl. ¶ 9.) Therefore, allegations regarding the first prong of this exception have been met.

Regarding the second element of the exception, the Wilkinsons report being unable to effectuate service upon Gerry Baby and Gerry Wood because Gerry Baby and Gerry Wood no longer exist. For this reason, they withdrew their claims against Gerry Baby and Gerry Wood. (Letter from Robert Morris to Judge Anita Brody of 7/22/09). Therefore, I find that the Wilkinsons have no remedy against the original manufacturer. For the reasons stated, the product-line exception may apply and I will deny Evenflo's motion to dismiss as to Count I (strict liability).

#### **B. Count VI (Breach of Contract) Against Huffy**

The Wilkinsons allege that Huffy breached the indemnification provision of the Agreement by failing to compensate them for Brooke's injury. This contention fails.

The Wilkinsons misconstrue the meaning of the indemnification provision. The provision does not specifically name any rights to indemnification by a party in the position of the Wilkinsons. The Agreement states:

Huffy and Sellers shall, jointly and severally, indemnify and hold Purchaser and its Affiliates, and their successors and assigns, harmless from and against, and in respect of . . . all obligations and liabilities of Sellers or any of its Affiliates,

whether accrued, absolute, fixed, contingent or otherwise, not assumed by Purchaser pursuant to the Assumption Agreement or under any other agreement executed and delivered by the parties in furtherance of the transactions described herein.

(Compl. Ex. A § 10.2.) This language creates a benefit for Evenflo, not the Wilkinsons.

Furthermore, the Wilkinsons are not third-party beneficiaries of the Agreement. In Scarpitti v. Weborg, 609 A.2d 147 (Pa. 1992), the Pennsylvania Supreme Court held that a party becomes a third-party beneficiary only when both parties to the contract express an intention to benefit the third party in the contract itself. Id. at 150. An exception exists for those who are not named in the contract but, given its circumstances and language, are nonetheless intended to be third-party beneficiaries. Id. But this exception does not “alter the requirement that in order for one to achieve third-party beneficiary status, that party must show that both parties to the contract so intended, and that such intent was within the parties’ contemplation at the time the contract was formed.” Burks v. Fed. Ins. Co., 2005 PA Super. 297.

The Wilkinsons concede that the Agreement does not affirmatively name them as third-party beneficiaries but argue that they meet the Scarpitti criteria for intended third-party beneficiaries. In fact, the Agreement rules out third-party beneficiaries. The Agreement provides that:

[N]othing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties to it and their respective successors and assigns.

(Compl. Ex. A § 13.4.) Thus, the contracting parties could not have intended that there should be third-party beneficiaries. Therefore, the Wilkinsons cannot be intended third-party beneficiaries and I will dismiss Count VI, the claim for breach of contract, as to Huffy.

An appropriate order follows.

s/Anita B. Brody

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ANITA B. BRODY, J.

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**ORDER**

**AND NOW**, this \_\_11<sup>th</sup> \_\_\_\_\_ day of August 2009, it is **ORDERED** that

- All claims against Gerry Baby Products and Gerry Wood Products are **DISMISSED**.
- Defendant Huffey Corporation's 12(b)(6) Motion to Dismiss Count VI (Breach of Contract) of Plaintiffs' Complaint (Doc. #11) is **GRANTED**.
- Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. Pro. 12(b)(6) by Defendant Evenflo Company, Inc. (Doc. #5), is **GRANTED** in part and **DENIED** in part:
  - the motion is **GRANTED** as to the claims of negligence (Count II), breach of express warranty (Count III), breach of implied warranty (Count IV), failure to warn (Count V), and breach of contract (Count VI)
  - the motion is **DENIED** as to the claim of strict liability (Count I).

s/Anita B. Brody

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ANITA B. BRODY, J.